IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 805 of 1993

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA

HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT
Versus
GAUTAM SAROJ ROY

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Appearance :
MR KC SHAH APP for Appellant
MR KG PANDIT for Opponent

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 01/03/2007

ORAL JUDGMENT : (Per : HONOURABLE MR.JUSTICE J.R.VORA)

1 This Criminal Appeal is preferred by the State under Section 378 of the Code of Criminal Procedure against the judgment and order delivered by Assistant Sessions Judge, Ahmedabad (Rural), Mirzapur, on 30th of November, 1992, delivered in Sessions Case No. 68 of 1992 whereby accused respondent therein came to be acquitted by learned Assistant Sessions Judge for the offences punishable under Sections 363 and 376 of the Indian Penal Code.

2 The basic prosecution case as has been disclosed in the complaint Exhibit-32 as under :

Complaint came to be filed on 5.2.1992 before Sabarmati Police Station at 15.00 hours and the date of incident is the same day at about 13.30 hours. Complainant J. Handri Kribhakaran declared that he was staying in No. 50 Konak Society, Sabarmati, Ahmedabad and was a Priest and was managing a house of prayer near his residence. He had two children, elder being Priskila, a daugher, aged about four years at the time of incident, and younger to her a boy, aged about 3 years . He was staying as tenant in the said premises and in the adjoining house, the accused was staying along with his family. At about 13.00 hours, after taking lunch, complainant – Kribhakaran was sitting with

his wife Beularani and along with one member of his church, named as Agustin, his daughter Priskila came running and crying in the house. She was frightened and when asked by the complainant, she by gesture showed her underwear. Complainant took out underwear of Priskila and found that her private part was bleeding. According to complainant, her daughter stated that the accused called her in varandha of his house, made her sit in his lap, and after taking out her underwear, caused injuries on her private part, which was bleeding. According to complainant, thereafter he went to the house of the accused. Priskila indicated and identified the accused who had committed the above said act.

3 On this complaint being filed before PW-11 Amos Rupsinh Kharadi, he recorded the same and Priskila as well as the accused were sent to Civil Hospital at about 9.35 at night and were examined by Dr. Belaben Tribhuvan Patel, PW-7. However, Priskila being of tender age, was not cooperating in examination, it was recommended by Dr. Belaben to have her examined through anaesthesia and, therefore, Dr. Haresh Umedchand Doshi examined Priskila with the assistance of Anaesthetist on 6.2.1992 at about 4.00 p.m. and offered his opinion. Investigating Officer Kharadi after registering the offence, took the charge of the investigation, recorded the statements of the witnesses, draw panchnamas and seized the clothes of Priskila and the accused and forwarded the same to Forensic Science Laboratory. Ultimately, a

charge sheet for the above said offences came to be filed in the Court of learned Magistrate and the case was committed to the Court of Sessions. Charge was framed against the accused vide Exhibit-2 on 18.6.1992 and vide Exh. 3 the accused pleaded not guilty and, hence, the prosecution tendered the evidence.

4 Prosecution examined in all 11 witnesses. PW-1 Kamlaben Muthuswami – Exh.6 is examined as an important witness. She stated that, on the day of incident, she was called by complainant to his house at about 1.30 p.m. After reaching the house of the complainant, she took out the underwear of Priskila and found that her private part was bleeding. Underwear and frock worn by Priskila were bloodstained. She identified those clothes before the court. Thereafter she inquired from Priskila about the incident and she conveyed to her that Gautam uncle (accused) called her and made her to sit in his lap. According to witness, Priskila further stated that the accused thereafter took out her underwear and caused injury to her private part. According to her, Priskila was expressing and describing this incident to her and her parents. Except that, she did not know anything.

PW-2 Augustin Anthony, was the person, according to the complainant, was present in his house when Priskila came running and crying at the time of incident. He did not support the prosecution case and stated that at the relevant time though he

was sitting in the house of the complainant and was discussing about obtaining a house on rent for him, Priskila came running and crying and went in the house. The witness stated that he did not know what had happened thereafter. He was declared hostile by the prosecution.

PW-3 Subhas Samson Johni is, panch of Exhibit-9 panchnama, examined at Exhibit-8. Exhibit-9 panchnama is a panchnama whereby the clothes put on by Priskila at the time of committing of the offence and the clothes put on by the accused were seized by the police. Underwear and frock of Priskila as well as pant and underwear of the accused were seized through this panchnama drawn on 5.2.1992 at 19.00 hours. However, PW-3 Subhas Samson Johni did not support the prosecution case and stated that his signature was obtained by the police in police station and he had not been to the house of the complainant. He was cross examined by the prosecution. Panchnama – Exhibit – 9 is placed on record.

PW-4 Phillip Solomon, who is examined at Exhibit - 10, is also a panch of panchnama at Exhibit-11. Exhibit – 11 panchnama was drawn on 5.2.1992 at 17.30 hours and this is in respect of the place of offence i.e. Bungalow No.8 of Konak Society and the location is indicated in the said panchnama. However, PW-4 Phillip Solomon did not support the prosecution case and stated that he

had not been to the place of offence and his signature was obtained by the police in one blank paper. He has been cross-examined by the prosecution.

PW-5 Prahaladbhai Ranchhodbhai is examined at Exh. 14 as the second panch of panchnama at Exhibit-11 and he has not supported the prosecution case.

PW-6 Ranubha Pratapsinh is examined at Exh. 15 as Police Constable, and according to him, after recording of the complaint of the case by PSI Mr. Kharadi, he was sent to the Civil Hospital along with Priskila and accused for medical examination. Doctor examined both of them, obtained blood samples and saliva samples of the both, and samples obtained were produced before the police station and Investigating Officer.

PW-7 Exhibit – 18 Bela Tribhuvan Patel is the Doctor, who examined the accused and the victim in first point of time. She stated that on 5.2.1992 she was on duty at the Civil Hospital, in Causality Ward, at about 9.35 p.m. , Priskila was brought to her with the police yadi. Priskila was not cooperating and she found that there were no marks of injury on her body and there were no marks of stain of any kind on her body. She found only one stain on the face of vagina of Priskila, and for that she issued certificate, which is at Exh. 19. She found as under :

- Patient is not cooperative for examination.
- Fairly built and family nourished.
- Secondary sex character not developed.
- Breast and genitals not developed.
- No ext. mark injury anywhere on the body.
- No any stain all over body.

P/s. Bleeding in the form of stain present at vaginal origin Hymen intact. Done under g.a."

She also examined the accused and issued certificate at Exh. 20. Her opinion in respect of the accused was as under :

- Patient is conscious.
- Well nourished & well built
- Secondary sex character well developed
- Ext. genitals well developed
- Pubic and axillary and chest hair present
- No ext. mark of injury any where on body including ext. genitals
- Smegma absent
- No any stain all over body."

She further stated in her examination -in-chief that the Smegma was absent and on account of taking bath, smegma might be absent. After intercourse, if bath is not taken, this smegma might develop. In her cross-examination, she stated that, if there

were no internal injuries, there were no possibilities of bloodstains of internal injuries. She admitted that smegma might develop on account of intercourse.

PW-8 - J. Handri Kribhakaran Dasnathan – complainant is examined at Exhibit-21. He stated that he had two children and was doing the work of priest in the said church. He stated that the incident occurred on 5.2.1992. He along with his wife Beularani and church member Augustin were present at his house. Augustin was discussing about obtaining a house on rent. At that juncture i.e. at 13.30 hours, Priskila was playing with a toy in the court yard. While they were pre-occupied in discussion, Priskila came running and crying in the house. She was much frightened. After addressing him as “dady – dady” she came to him. He asked Priskila that what had happened. Her hands were trembling on account of fright. Priskila showed her underwear and her underwear was bloodstained. On his asking, Priskila stated to the witness that she was called by the accused at his house and after taking out her underwear, the accused penetrated his private part in her private part and on account of pain, she came rushing to her house. He indicated by gesture towards the accused and stated that the accused had done the above act. The witness stated that his wife also saw blood oozing from the private part of Priskila and was dropping on the ground. The witness stated that he requested Augustin to look after Priskila and he went to call witness

Kamlaben. Kamlaben came to his house. Kamlaben asked about the incident to the mother, sister and grandmother of accused. Mother of the accused had undergone surgery and, therefore, she was sleeping inside the house. Kamlaben insisted to call Gautam. Gautam came out of the house and with folded hands requested Kamlaben to excuse him. The witness stated that his daughter was bleeding. Neighbours were gathered and they stated that Priskila was required to be taken to hospital, but a police complaint also was required to be filed. Therefore, along with Augustin and his daughter Priskila, he went to Sabarmati Police Station and offered his complaint. The witness stated that he was very much emotionally affected and could not explain to the police properly, but he conveyed everything to the police through Augustin. The police did not take action and, therefore, he called one Tabhani and thereafter police took action. He has been cross-examined in detail.

PW-9 Beularani, wife of the complainant and mother of the victim is examined at Exh. 22. She stated that the accused was residing in the same society and in the adjoining house. The incident occurred on 5.2.1992 at about 1.30 p.m. Along with his husband and Augustin, she was at her house. Still they had not taken the lunch and they were about to take the lunch. Augustin was discussing about obtaining a house on rent for him. At that time, Priskila was playing in the court yard of the house and suddenly Priskila came running in the house and was crying. Her

husband asked Priskila what had happened. After sizing her frock, showed her underwear. It was noticed by her that the underwear was stained and wet by blood. She was profusely bleeding from her private part. Seeing the profuse bleeding, she was almost became unconscious. At that time, her husband asked Priskila that what had happened and Priskila replied that accused had taken her in the veranda of his house. After indicating by hand the house of Gautam, Priskila stated that the said act was done by the accused. Priskila further stated to her father that Gautam uncle (accused) showed rose apple (Jambul) and was called by her and, therefore, she went to the house of the accused. Priskila further stated that thereafter Gautam took out her underwear and inserted his private part in the private part of Priskila. On account of severe pain, she ran from there and came to the house. According to the witness, Priskila was crying and was frightened. According to this witness, thereafter, her husband called Kamlaben and Kamlaben went to the house of the accused. Kamlaben returned from the house of the accused and stated to her husband that Priskila has been ravished by the accused and, therefore, they were required to go to the Police Station and offer complaint. She identified the clothes, which were put on by Priskila at the time of incident. She has been cross-examined by the defence.

PW-10 Dr. Haresh Umedchand Doshi, is examined at Exh. 29. According to him, while he was serving as Assistant Professor,

Gynaecology, in Civil Hospital, on 6.9.1992, patient named as Priskila was brought to him and he administered anaesthesia to her. On that day, at 11.00 a.m. Chief of the unit Dr. Bharatiben K Bhatt had examined Priskila, but Priskila was not cooperating and, therefore, Dr. Bharatiben had recommended to examine her with the help of anesthesia. On that day, in the morning, the patient had taken food, she could not be examined and was examined on 6.2.1992. On examination, he found the following physical conditions of victim Priskila, which he noted in case papers at Exh. 30, are as under :

> Local Exam: Moni pubic normal. Vulva normal. Ext. sphincteric of urethra normal. No marks of injury, viz. Scratches or abrasions present anywhere on the genitals & medial aspect of thigh. No bleeding. Two labia separated by finger Hymen intact. No marks of injury seen on hymen. Only sound could be passed through the hymen. No blood marks as the sound indicating no blood in vagina.
>
> Small cervix. Uterus felt. Both parametrium normal. On pressing vagina nothing could be extracted.'

He has been cross examined by the defence and he stated that if there be superfluous and abrasions on the skin, those abrasions, ordinarily, would heel in 24 hours, but the marks of

heeled abrasions could be seen.

PW-11 Amos Rupsinh Kharadi, is examined at Exh. 31. According to him, at the relevant juncture, he was working as PSI in Sabarmati Police Station. On 5.2.1992, the complainant came at about 15.00 hours for offering his complaint. He was knowing little Hindi and English. One Mr. Augustin was with him and with the help of Augustin, Complainant gave his complaint. Augustin knew Gujarati very well. The complaint was identified at Exh. 32 by the witness. He stated that thereafter he investigated the offence, draw the panchnamas and after seizing the clothes of the accused and Priskila, they were sent to Forensic Science Laboratory for opinion. In paras 2 and 3 of his examination-in-chief, the statement made to him by hostile witnesses were got corroborated from him. He has been cross-examined by the defence.

5 This is all is the evidence of prosecution along with the documentary evidence, as referred to above, including the opinion of Forensic Science Laboratory. After the evidence of the prosecution was over, further statement of the accused was recorded by the Trial Judge wherein after denying the evidence of the prosecution in toto, accused explained that on the day of the incident, he had been to College right from morning 7.00 a.m. to 2.30 p.m. Complainant and other 30 to 40 people were running a church in a house adjoining to his house. For the whole day, they were playing harmonium and dhol, which was causing disturbance

and nuisance. He had requested Complainant not to disturb by these noises because disturbance was caused in his study, but Complainant threatened him that he will cause noise and he will see that how the accused was studying. The accused produced on record a receipt of fee which he paid in College and for the examination. He further explained that the Complainant as well as his friends were requested by the Chairman of the society not to cause disturbance through noise to the persons residing in the society. The accused explained that this dispute was going on two years. He stated that he was innocent and he had not committed any offence.

6 The Trial Court, therefore, heard learned APP and the defence in detail and came to the above conclusion and, hence, this Appeal by the State.

7 On behalf of the State, learned APP Mr. K.C. Shah has vehemently argued that the judgment and order impugned in the Appeal is manifestly perverse, illegal and contrary to law. A serious incident of rape or attempt to commit rape, is very lightly appreciated by the learned Trial Judge and which has resulted in miscarriage of justice. Learned APP urged that one can visualize that, at the time of incident, victim – Priskila of aged four years. Within seven months of the incident, the evidence in trial came to be recorded. It is not expected that a child of four years,

ravished by the accused, would be examined by the prosecution, and even then, the learned Trial Judge came to the perverse conclusion that there was no direct evidence against the accused as the victim Priskila was not examined by the prosecution, and learned Trial Judge attached undue importance to this aspect. It is stated that, in rape cases, it is to be proved by prosecution whether the rape was committed or not and direct evidence is never insisted upon by the courts. It is stated that for the defence, as has been advanced by the accused, one cannot imagine that the parents of four years old, would put off their reputation at a stake for the petty reason, as explained by the accused. In rape cases, therefore, evidence has to be appreciated in the manner that none will put everything at the stake by filing a false rape case and particularly when victim is a child, and in this case of four years. Therefore, the learned APP has vehemently urged that the contradictions, as discussed by the learned Trial Judge in detail and with enforcement, is of no importance as the medical evidence and the evidence of father of the victim are sufficient to bring the guilt home of the accused. Referring to the medical evidence, it is submitted that, for proving a charge of rape, it is never a rule of law that there should be injury marks on the body of the victim or the accused or there be presence of smegma, etc. Therefore, according to learned APP, the medical evidence is not helpful when the case is proved beyond doubt by ocular evidence of the father of the victim, and that there was no reason that why he should

create a false case of rape committed upon the child against the accused. Our attention is also drawn to the evidence of Dr. Belaben, who is examined as PW-7. She has stated in her evidence that she found bloodstains on face of vagina of the victim. This is according to learned APP was a corroborating evidence of the complainant and there was no reason to discard this evidence and come to the conclusion that there was no medical evidence in support of the say of the prosecution witnesses. Dr. Belaben has examined the victim immediately after the incident. It must be noted, the learned APP further argued that, the profuse bleeding and dropping of blood on the ground, as has been deposed by the witnesses, assumes no relevance or significance when once it is proved by the evidence of the father of the victim that victim conveyed that the offence was committed by the accused and she indicated the accused by gesture and, therefore, it is neither necessary to examine the victim in the facts and circumstances of the case, and that otherwise, case is proved beyond doubt through the evidence of the father of the victim. Relying upon a decision in the matter of JITO vs STATE OF HIMACHAL PRADESH, as reported in 1990 Cri. L. J., 1434, it was argued that no one will even imagine to file a false case of rape putting minor child at a stake. On this aspect, learned APP Mr. K.C. Shah, has also relied upon a decision of the Apex Court in the matter of RAFIQ vs. STATE OF UTTAR PRADESH, as reported in AIR 1981 SC 559. A decision of the Apex Court in the matter of STATE OF PUNJAB vs. KARNAIL SINGH, as reported in (2003) 11 SCC 271,

is also relied upon by the learned APP, especially the observations made by the Apex Court in para 6 of the judgment. Relying upon decisions of the Apex Court in the matter of GURCHARAN SINGH vs STATE OF HARYANA, as reported in AIR 1972 SC 2661 and in the matter of HARPAL SINGH vs STATE OF HIMACHAL PRADESH, as reported in AIR 1981 SC 361, it was argued that the question of injury on the private part in rape case is immaterial, as consent of the minor is immaterial in rape cases. The assertions made by the complainant in his complaint is proved by him by cogent evidence and that is sufficient to prove the guilt of the accused. After relying on decisions of (i) the Orissa High Court in the matter of BASUDEV NAIK vs. STATE OF ORISSA, as reported in 1991 CRI. L. J. 1594; (ii) the Delhi High Court in the matter of JAGADISH Pd. SHARMA vs STATE, as reported in 1995 CRI. L. J. 2501 and (iii) the decision of the Orissa High Court in the matter of GANANATH JENA vs STATE OF ORISSA, as reported in 1996 CRI. L. J. 227, it was alternatively argued that if the case of rape is not proved beyond doubt, then certainly, the circumstances which the prosecution proved are sufficient to bring home the guilt on the part of the accused to have committed the offence of attempt to commit rape or an offence under Section 354 of the Indian Penal Code as deposed by the father of the victim girl sufficiently by gesture indicating the accused to be the person who committed the crime against her. Learned APP, therefore, urged that in totality of these circumstances, the case was proved beyond doubt and learned Trial Judge appreciated the

evidence in erroneous and wrong manner and came to a wrong conclusion, which is manifestly erroneous and requires to be interfered with. Therefore, it is urged that the Appeal be allowed and the accused should be convicted either under sections 376 and 363 or alternatively under Section 376 to read with Section 511 or under Section 354 of the Indian Penal Code.

8 As against that, learned Advocate Mr. K. G. Pandit, appearing for the respondent submitted that the prosecution firstly has to prove its case beyond reasonable doubt by cogent evidence which could not be done by the prosecution though it was the prime duty of the prosecution. In rape cases, medical evidence would be of prime material and in this case medical evidence, as has been led by the prosecution, itself improbabilised the factum of the rape itself, which is evident from the evidence of Dr. Belaben and Dr. Haresh Umedchand Doshi and, therefore, there is no evidence of the victim that the rape was committed at the first place. There is no abnormality in the medical evidence or it could not be shown by the prosecution that why this medical evidence could be ignored. It is submitted that the only independent witness i.e. Augustin has turned hostile and remaining three witnesses are interested as two of them are parents of the victim while third one Kamlaben is interested. There is contradiction in respect of the factum of the prosecution case amongst these three witnesses to the extent that two witnesses i.e. Kamlaben and Beularani never

stated before the police that victim Priskila conveyed before her father that the accused committed the offence and, therefore, they were not reliable by the Trial Court, while third witness i.e. father of the victim J Handri Kribhakaran stated something else than what was his original version in the First Information Report before the police and that is an admitted fact on the record. In these circumstances, according to learned Advocate Mr. Pandit, the Trial Court came to the conclusion that the factum of the rape could not be proved beyond doubt by the prosecution. The Trial Court discussed the evidence of those three witnesses in detail and medical evidence and rightly come to the conclusion to acquit the accused. It is submitted that it is not the submission of the State that the conclusion is not according to the evidence, but the submission is, appreciation of the evidence was done erroneous by the Trial Court and therefore taking a second view, accused be convicted, which is not permissible. Going through the judgment impugned in detail and the evidence, learned Advocate for the respondent Mr. Pandit relying upon the authorities as discussed by the learned Trial Judge in favour of the accused in the judgment and order impugned, vehemently submitted that, no perversity or illegality could be brought about by the appellant and, therefore, the interference in this case is not possible. It is submitted that the Appeal therefore must be dismissed.

9 It must be noted that both the learned counsels

addressed this Court in respect of the scope of interference by the High Court in appeals against acquittal.

10 Having heard learned counsels for the parties and having gone through the evidence and the reasonings given by the Trial Judge, we find that, mainly, the Trial Judge acquitted the accused on following three grounds :

(i) there was no direct evidence as the victim was not examined;

(ii) there were contradictions and modification in prosecution theory by the witnesses that the genesis of the prosecution case was destroyed and that the witnesses therefore not reliable;

(iii) the medical evidence did not support the factum of rape having been committed by the accused on the person of the victim, as stated by the prosecution witness.

11 When both the learned counsels very extensively addressed this Court in respect of the scope of interference in acquittal appeal, we would like to observe the settled law which regulate the hearing of the appeal by the High Court against an order of acquittal passed by the Trial Court. In various decisions, the

Apex Court has settled down that the High Court possesses all powers in an appeal against the order of acquittal and nothing less than the powers which it possesses while hearing an appeal against an order of conviction. The High Court has also the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trial court. If the said findings are against the weight of the evidence on record, those findings can be reversed, as in other words, such findings would be perverse. However, before reversing the findings of the acquittal, the High Court has to consider each grounds on which the order of acquittal was based and record its own reasons for not accepting those grounds and not subscribing to the view expressed by the Trial Court that the accused was entitled to acquittal. The High Court must keep in mind that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in favour of the accused by the Trial Court. Upon appreciation of the evidence, if still another view, which could be reasonably taken, then in those circumstances also, the High Court must take a view which favours the accused. That does not mean that there is an embargo on the appellate court on re-appreciating the evidence upon which the order of acquittal is based and in no circumstances the view taken by the High Court can be interfered with. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. No doubt, the

miscarriage of justice which may arise from the acquittal of the guilt, is nothing less than from the conviction of an innocent in a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence where the accused has been acquitted for the purpose and ascertaining as to whether any of the accused has really committed any offence or not. When there are compelling and substantial reasons for interference in the judgment and order of acquittal as delivered by the Trial Court, the High Court possesses all such powers to prevent miscarriage of justice resulting from the judgment and order of acquittal. If the impugned judgment is clearly unreasonable, and relevant and convincing materials have been unjustifiably eliminated in the process, it would be compelling reasons for interference in the order of acquittal.

12 Keeping in view the above scope of the appeal, the reasons given by the Trial Court for acquittal of the accused are examined by us. Along with the scanning of the reasons, we have also undertaken our own independent assessment of the evidence recorded during the trial to find out whether there are substantial or compelling reason to interfere in the judgment and order of acquittal impugned in this Appeal. We find that there are four material witnesses. So far as ocular evidence is concerned, we would like to make it clear that, we do not subscribe the view taken by the Trial Court that in rape cases and particularly in this case, there

was no direct evidence and, therefore, the prosecution case failed. In all cases, it is not rule of law that the direct and direct evidence must be tendered by the prosecution and that failing to do so, the prosecution case collapses when the rule of law is, the prosecution is duty bound to tender the best evidence available. In this case, victim Priskila was aged about four years at the time of incident and also when the evidence came to be recorded by the Trial Court, it cannot be the expectation of law that a mere child of four years must be examined by the prosecution to prove its case and failing which the prosecution case fails and, therefore, the view taken by the Trial Court that since Priskila was not examined, the case fails, is not sustainable in our view. What is important is whether the factum and the thread of the prosecution case is proved by the best available evidence as tendered by the prosecution. We have examined the case from this angle and we have also re-appreciated the evidence. True that, all the four material witnesses i.e. PW-1 Kamlaben Muthuswami, PW-2 Augustin Anthony, PW-8 J. Handri Kribhakaran and PW-9 Beularani are material witnesses to prove the factum of the core of the prosecution case. While we appreciated the evidence, it is clear that PW-2 Augustin Anthony did not support the prosecution case wholeheartedly. He supported the prosecution case to the extent that Priskila did come to the house of the complainant where he was sitting and discussing, but he did not know what had happened thereafter. As per prosecution theory, Kamlaben Muthuswami, being acquaintance of the parents

of the victim, was called by the father PW-8 immediately. According to prosecution theory and as stated by Kamlaben, she also noticed bloodstains in the underwear of Priskila and the statement of Priskila before her father that the act was done by the accused. She has not stated anything to support the say of the complainant that she went to the house of Gautam i.e. accused and accused admitted to have committed the offence. Reliance is not placed by the Trial Court on this witness because Augustin stated in his deposition that it had not happened that the complainant had called Kamlaben but Kamlaben was present in the house. This witness admitted that whatever was stated by her in examination-in-chief about having seen bloodstains in the underwear of Priskila and about Priskila's statement to her father that the offence was committed by the accused, was ever stated by her before the police. After the incident, she had not been to the police station but she had gone to her house. In the same day in the evening she had been to the house of the complainant where police had come and had inquired her name. She denied that the police recorded her statement in this respect. She categorically stated that the fact that she noticed bloodstains in the underwear of Priskila and the involvement of the accused upon the say of Priskila, was stated by her first time in the court on the day of the deposition and she had not stated anything before the police in this respect. In these circumstances and for other contradictions, as narrated by learned Trial Judge in para-10 of his judgment, no reliance was

placed by the Trial Court on the evidence of this witness to prove the factum of rape committed by the accused. Necessary it is to observe that though attempt is made by the prosecution in the evidence of Investigating Officer PW-11 Amos Dalpsinh Kharadi that he had recorded the statement of Kamlaben, but no attempt is made to corroborate the prosecution case with the contents of the statement made by Kamlaben before the police. Therefore the evidence of this witness becomes doubtful that the version which she narrates admittedly was not narrated before the police and it was not her case before the police that she noticed the bloodstains in the underwear and heard the involvement of the accused in the crime. We do not find any reason to deviate from the findings of the Trial Court for not placing any reliance upon this witness.

13 Now so far as the evidence of complainant is concerned, in his examination-in-chief, he stated that Priskila stated to him that accused had called her and had put out her underwear and had penetrated in her private part. In examination-in-cross, he admitted that he did not state those words in the complaint. One can understand the manner of the expression different from first information report and the deposition of the complainant. As we found from the complaint at Exh. 32 that he stated in the complaint that his daughter conveyed him that the accused took her to the court yard of his house, made her sit in his lap and caused injury on her private part, so her private part started bleeding. Though the

Trial Judge has considered this to be an important contradiction but one may say that there may be variation in expression but the evidence of complainant is not believable for other reasons as well. In chief-examination, we found that the complainant has stated that Priskila was profusely bleeding. This is not supported by the medical evidence. Further which is not stated in the complaint and which is not the prosecution case has been stated by the complainant. It is not the prosecution case from the beginning that Kamlaben was called by the complainant and she was sent to the house of Gautam where with folded hands Gautam admitted to have committed the offence and requested to excuse him. This is so because in her deposition even Kamlaben has not supported the complainant in this respect and the theory of profuse bleeding has been imbrobabilized by the medical evidence. Whether in rape cases, proving of the injuries are necessary or not, that will be discussed later on, but the evidence of the complainant alone cannot be believed for the reasons that there are contradictions in the First Information Report and the deposition which he gave before the court and secondly even his original version before the police could not be established on account of medical evidence led by the prosecution itself. The Trial Judge, therefore, rightly not relied upon the evidence of the complainant to prove the factum of rape having committed by the accused upon the victim.

14 While the fourth important witness Beularani, after

stating so many things, as discussed by the learned Trial Judge in para-9 of his judgment, admitted that she never stated before the police that Priskila conveyed to her father that the accused had committed the offence and that her underwear was stained with blood and she was still profusely bleeding from her private part. It appears that no such statement had been given by her before the police and she first time stated before the court that she found underwear of Priskila with profused bleeding and that she made a statement before the court that the accused has committed offences. When she admitted having not stated those facts before the police, the learned Trial Judge has rightly not relied upon the evidence of this witness. In the evidence of PW-11 Amos Rupsinh Kharadi – Investigating Officer, no corroboration in this regard was brought about by the prosecution. True that, corroboration or contradiction proved in the evidence of Investigating Officer about what might have been stated by the witnesses, may not be a substantive evidence, but what appears from the findings recorded that it was not the theory from the beginning of the prosecution that Priskila - victim of the incident conveyed certain incident to her father, which was witnessed by either Beularani or Kamlaben, as both of them have stated this first time before the court, while the evidence of complainant falls short of proving guilt of the accused as aforesaid to prove the factum of rape having been committed by the accused upon the victim.

15 Therefore, we find that though the prosecution was not duty bound to tender the direct evidence of victim Priskila, the prosecution has attempted to tender best evidence available, but on account of those contradictions, the witness have failed to inspire confidence of the Trial Judge, and for the reasons recorded above, only because on appreciation of evidence, some other view is possible, the view taken by the Trial Judge cannot be interfered with in the appeal against the acquittal. The learned Trial Judge has appreciated the evidence as recorded and hence not ignored any evidence or so mis-appreciated the evidence as to label the whole exercise to be perversity. The learned Trial Judge has attempted to discuss the contradictions and the reasons for not relying on particular witness by the Trial Court. On independent assessment, we also come to the conclusion that the witness Beularani and the witness Kamlaben were not the eye witnesses of the fact that Preskila conveyed to her father that the crime was committed by the accused and that her underwear was profusely bloodstained and she was badly injured in the vagina as to bleed profusely. The only available witness, then the complainant, is also not reliable for the above reason that so far as the factum of rape is concerned, his evidence is improbabilised by the medical evidence and that the remaining part of his version is in contradiction of the prosecution story and other witnesses. True it is, as argued by learned APP that in rape cases it is not the law that always the prosecution is duty bound to prove the injuries on the body of the victim or the accused,

as the case may be. The case of rape against an accused may be proved even if the medical evidence negatives the injuries on the part of the body, but on the condition that the evidence of prosecutrix is found convincing as to the factum of rape having been committed by the accused upon her. In the present case, the question of examining Priskila, aged about four years, would not arise at all and the prosecution case, as aforesaid, would not fail on that count, but prosecution case fails on the count that the evidence led to prove the factum of rape is not inspiring the confidence, as aforesaid. The question before this Court is not whether the marks of injury is always necessary to be proved by the prosecution in rape cases, but the question before the Court is whether factum of rape is proved by the evidence tendered by the prosecution and when the evidence of factum of rape is not established, the prosecution case must fail. In this realm of appreciation of evidence, the evidence of medical experts are material and necessary. The rule of law is well settled by the Apex Court in many decisions that ocular evidence always takes precedence and must be given importance over medical evidence. This is so because ultimately the medical evidence is the evidence of experts and subject to error of judgment while ocular evidence is the evidence which inspires the courts to believe certain facts or to disbelieve certain state of affairs. The witnesses are eyes and ears of justice and, therefore, it is normal rule that the ocular evidence is of primary importance than the medical evidence, but at the same

time, where the medical evidence totally improbabilise, the ocular version, that can be taken to be a factor to affect the credibility of the prosecution version. The decision of the Apex Court in the matter of STATE OF RAJASTHAN vs. BHANWAR SINGH, as reported in (2004) 13 SCC 147, and the observations made by the Apex Court in para-6 may be referred to. In the present case also the prime reason for not placing reliance upon the evidence of complainant is the medical evidence. Medical evidence led by the prosecution totally improbabilise the ocular version of the complainant. Therefore, the question whether the prosecution is duty bound to prove the injuries on the body of the victim in rape cases would not arise, but the question is whether factum of the rape committed is proved and if not proved by medical evidence, in that case and in peculiar facts and circumstances of this case, may improbabilize the version of ocular evidence. We find that the Medical Officers are examined by the prosecution in this respect much earlier point of time, just after the incident the victim was examined by Dr. Belaben PW-7 where she has specifically stated that there were no stains on the body of the victim, hymen was intact, there were no injury marks. Now this fact improbabilises the theory of the complainant that Priskila told him that a rape was committed in the manner as has been advanced by the prosecution case upon her and she was profusely bleeding. Not only that but Priskila was further examined by other Medical Officer with the help of Anaesthetist – PW 10 Dr. Harish Umedchand Doshi, who stated that he examined the victim

on 6.2.1992 after administering anaesthesia and he found no abnormality on the private part of victim while there were no injuries on the private part of the victim, there was no bleeding at all, the hymen was intact and allowed only ultrasound that may be the instrument, perhaps, for the examination. There were no marks of bleeding in examining by ultrasound inside the private part of the victim. The learned APP emphasizing the fact that Dr. Belaben stated that there were bloodstains on outer vagina of the victim, but the evidence of this witness i.e. Dr. Belaben and Dr. Haresh Umedchand Doshi undoubtedly established that there were no injury marks on vagina part of the victim and that there were no bleeding from the injuries at all as examined by ultrasound. Therefore, it is well probable that there was no rape committed on the victim as per the evidence of these two witnesses and the factum of rape, as narrated by the complainant as witness improbabilized the prosecution case.

16 So far as the alternative argument of learned APP Mr. K.C. Shah is concerned, the decisions cited by learned APP are on the facts of each case cited. What is the evidence and the facts of the present case is that the rape was committed upon Priskila and it is not the case that though offence of rape could not be proved but something less was established by the prosecution. These are not the facts of the present case because the prosecution witnesses stated about having committed the rape by the accused and that

theory could not be established. The evidence recorded is not such, by which it is possible to conclude that if not rape then the accused might have attempted to commit an offence of rape against the victim because there is no evidence in this regard. In these circumstances, the alternative argument as advanced by learned APP also cannot be accepted.

17 In view of above, we while not subscribing the view of the Trial Court that there was no direct evidence of Priskila and, therefore, the case fails, but for the reasons recorded by us as the evidence falls short, could not prove prosecution case beyond reasonable doubt. We do not therefore find any reason to interfere in the conclusion arrived at by the Trial Judge from the reasoning given by him except the above one, as stated by us.

18 In the result, this Appeal stands dismissed. Bail bonds submitted by the respondent stands cancelled.

(J. R. VORA, J.)

(SHARAD D DAVE, J.)

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